STATE OF MICHIGAN
IN THE SUPREME COURT

On Appeal From the Court of Appeals
O'Connell P.J., Fitzgerald and Murray, JJ

COUNTY OF WAYNE,

Plaintiff-Appellee,

v.

EDWARD HATHCOCK, *et al*,

Defendants-Appellants.

Supreme Court Nos. 124070-124078

Court of Appeals Nos. 239438, 239563, 240184, 240187, 240189, 240190, 240193, 240194, and 240195

Wayne County Circuit Court
Case Nos. 01-113583-CC, *et al.*

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MARK J. ZAUSMER (P31721)
MISCHA M. GIBBONS (P61783)
Attorneys for Plaintiff-Appellee
ZAUSMER, KAUFMAN, AUGUST & CALDWELL
31700 Middlebelt Road, Suite 150
Farmington Hills, Michigan 48334
248-851-4111

ALAN T. ACKERMAN (P10025)
DARIUS W. DYNKOWSKI (P52382)
Attorneys for Defendants-Appellants (except Specks)
ACKERMAN & ACKERMAN, P.C.
5700 Crooks Road, Suite 405
Troy, Michigan 48098
248-537-1155

MARTIN N. FEALK (P29248)
Attorney for Defendants-Appellants Speck
20619 Ecorse Road
Taylor, Michigan 48180-1963
313-381-9000

ALLAN S. FALK (P13278)
Appellate Counsel for Defendants-Appellants
(except Specks)
2010 Cimarron Drive
Okemos, Michigan 48864
517-381-8449

MARY MASSARON ROSS (P43885)
Appellate Counsel for Defendants-Appellants (except Specks)
PLUNKETT & COONEY, P.C.
535 Griswold, Suite 2400
Detroit, Michigan 48226
313-983-4801

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CITY OF DEARBORN'S BRIEF AS *AMICUS CURIAE*

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STATEMENT OF THE BASIS OF JURISDICTION

Defendants-Appellants' statement of jurisdiction is complete and correct.

STATEMENT OF THE QUESTIONS INVOLVED

Pursuant to this Court's November 17, 2003, Order, *Amicus Curiae* City of Dearborn submits its brief addressing the following questions:

I. **DOES PLAINTIFF HAVE THE AUTHORITY, PURSUANT TO MCL 213.23 OR OTHERWISE, TO TAKE DEFENDANTS' PROPERTIES?**

AMICUS CURIAE CITY OF DEARBORN ANSWERS:

MCL 213.23 delegates the power of eminent domain to public corporations and is, on its own, sufficient authority for instituting condemnation proceedings notwithstanding other statutes also authorizing condemnation of private property.

II. **ARE THE PROPOSED TAKINGS, WHICH ARE AT LEAST PARTLY INTENDED TO RESULT IN LATER TRANSFERS TO PRIVATE ENTITIES, FOR A "PUBLIC PURPOSE", PURSUANT TO *POLETOWN NEIGHBORHOOD COUNCIL V CITY OF DETROIT*, 410 MICH 616 (1981)?**

AMICUS CURIAE CITY OF DEARBORN ANSWERS:

Michigan and federal eminent domain law have recognized that the transfer of property acquired by condemnation to a private entity does not invalidate the public purpose for the taking.

III. **IS THE "PUBLIC PURPOSE" TEST SET FORTH IN *POLETOWN, SUPRA*, CONSISTENT WITH CONST 1963, ART 10, § 2 AND, IF NOT, SHOULD THIS TEST BE OVERRULED?**

AMICUS CURIAE CITY OF DEARBORN ANSWERS:

The *Poletown* "public purpose" test is not consistent with Const 1963, art 10, § 2, and should be overruled.

IV. **SHOULD A DECISION OVERRULING *POLETOWN, SUPRA*, APPLY RETROACTIVELY OR PROSPECTIVELY ONLY, TAKING INTO CONSIDERATION THE REASONING IN *POHUTSKI V CITY OF ALLEN PARK*, 465 MICH 675 (2002)?**

AMICUS CURIAE CITY OF DEARBORN ANSWERS:

A decision overruling *Poletown* may be applied retroactively if it clarifies and restores pre-existing Michigan condemnation law erroneously applied by courts following *Poletown*.

INTRODUCTION

Amicus Curiae City of Dearborn (hereinafter "Dearborn") is a body corporate, incorporated as a Michigan Home Rule City pursuant to MCL 117.1. Dearborn is a major southeastern Michigan employment and education center encompassing approximately 29 square miles in the Detroit metropolitan area. As a large and populous urban center, Dearborn's eminent domain power is essential to accomplishing a variety of public improvements and purposes for the benefit of its citizens. Dearborn generally supports the position of Plaintiff-Appellee County of Wayne and answers the four questions posed by this Court's November 17, 2003, Order as follows:

1. *Does plaintiff have the authority, pursuant to MCL 213.23 or otherwise, to take defendants' properties* ? As a "public corporation" as defined by MCL 213.21, Dearborn has a significant interest in this Court's decision defining the scope of the eminent domain power conferred to public corporations pursuant to MCL 213.23. Dearborn submits the plain language of MCL 213.23 delegates the power of eminent domain to public corporations (such as Plaintiff and Dearborn) and, is, on its own, sufficient authority to condemn property notwithstanding other statutes also authorizing condemnation of private property.

2. *Are the proposed takings, which are at least partly intended to result in later transfers to private entities, for a "public purpose", pursuant to Poletown Neighborhood Council v City of Detroit, 410 Mich 616 (1981)* ? As an agency authorized to exercise the power of eminent domain for public purposes, Dearborn has a significant interest in this Court's decision determining whether the transfer of private property acquired by condemnation to other private entities invalidates the public purpose justifying exercise of the eminent domain power. Michigan and federal eminent domain law have recognized that the transfer of property acquired by condemnation to a private entity does not invalidate the public purpose for the taking.

3. *Is the "public purpose" test set forth in Poletown, supra, consistent with Const 1963, art 10, § 2, and, if not, should this test be overruled*? As an agency authorized to exercise the power of eminent domain for public purposes, Dearborn has a significant interest in this Court's decision determining whether the *Poletown* "public purpose" test is the proper measure of the constitutionality of acquiring private property by eminent domain. The so-called *Poletown* public purpose test is not consistent with Const 1963, art 10, § 2, and should be overruled. The Michigan Constitution does not require that the public benefit supporting the taking "predominate" over any private benefit resulting from the taking. This Court should restore Michigan condemnation jurisprudence to a standard consistent with the Michigan and United States Constitutions; the decisions of the Michigan Supreme Court prior to *Poletown*; the decisions of the United States Supreme Court; the traditional scope of judicial review of government action; and the Legislature's intent to provide for limited, expeditious judicial review of condemnation actions.

4. *Should a decision overruling Poletown apply retroactively or prospectively only, taking into consideration the reasoning in Pohutski v City of Allen Park, 465 Mich 675 (2002)* ? Dearborn currently is engaged in a $50 million urban redevelopment project that will result in the transfer of a portion of the property condemned for the project to a private entity. In reliance upon the authority of *Poletown*, Dearborn has committed substantial public funds in the planning, design, and construction of this project, as well as in prosecuting its court action to condemn the property necessary for the project. Thus, Dearborn has a significant interest in whether an opinion overruling *Poletown* should be applied retroactively or prospectively. If this Court overrules *Poletown*, the decision may be applied retroactively if it would restores the pre-existing Michigan condemnation law erroneously applied by courts following *Poletown*.

STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

The material facts and proceedings in this case as set forth by the Court of Appeals are:

The real property at issue lies directly south of the airport's newest midfield terminal, and encompasses approximately 1,300 acres of largely empty and unused real property. Plaintiff's proposed development for the property is called "the Pinnacle Project" or "the Pinnacle Aeropark Project." Huron Township extends over about two-thirds of the project's land area, and the rest lies within the city of Romulus. Only two percent of the project area involves the defendant owners in the present action. Plaintiff already holds title to the rest of the project area, or soon will.

In December 1992, the Federal Aviation Administration (FAA) began a program to help adjacent landowners either adjust to the presence of a new air terminal at the airport or sell their land. The FAA gave plaintiff $21 million in federal funds to purchase 500 acres of the adjacent property from those who would sell, conditioned on the requirement that plaintiff make the property economically viable.[1] In 1998, plaintiff formed the idea to construct a combination technology and industry park, business center, hotel and conference center, and recreational facility. Plaintiff billed the project as a "world-class development" that would be particularly attractive because it is next to one of the "largest airports in the world." According to plaintiff, the benefits of the project included generating thousands of jobs; increasing the tax base by tens of millions of dollars; expanding the tax base from largely industrial to mixed industrial, service, and technological; and improving the county's image, which would in turn draw more companies to the area and help fund plaintiff's delivery of services to its residents. A consulting company plaintiff hired found that 30,000 jobs and $350 million would be generated by the Pinnacle Project over time.

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[1] Defendants argue that the FAA was specifically concerned about noise abatement, not redevelopment of the property.

Plaintiff secured approval of the project and a promise for funding from the state of Michigan. In June 2000, the Legislature passed "smart park legislation" encouraging the technology industry to partner with Michigan universities and form technology zones in Michigan. In April 2001, the Michigan Economic Development Corporation (MEDC) selected plaintiff's project proposal for designation as one of the few "smart parks" in Michigan.

According to plaintiff, when defendants refused two good faith offers for purchase of their property, plaintiff adopted a "Resolution of Necessity and Declaration of Taking" that authorized it to condemn defendants' land and acquire it by eminent domain. In April 2001, plaintiff filed the present individual complaints for condemnation, and defendants filed motions challenging the complaints on the ground of necessity. The trial court treated the multiple actions as consolidated and discovery began. Defendants argued that because plaintiff had not decided on specific uses for the property yet and because the property had yet to be rezoned, plaintiff's condemnation action must fail. Plaintiff replied that only defendants' refusal to relinquish their property stood in the way of plaintiff's completion of the project, despite the fact that the future buyers of the property were not yet determined.[2]

Additional facts relevant to this Court's consideration of the case include the following: The [County's] Resolution of Necessity and Declaration of Taking described the Pinnacle Project as a mixed use business park, with the focus being the development of light manufacturing and research and development facilities and open use land, and stated that it was necessary for Wayne County to acquire approximately 1,200 acres of property within the proposed site to construct the Pinnacle Project. (Plt Apx 5226). Wayne County emphasized that it was necessary to take the private

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[2] According to the trial court's opinion, utility installation and road improvements for the Pinnacle Project were set for spring and summer 2002. There is no information in the record regarding whether these plans materialized.

property that was the subject of the resolution to develop the Pinnacle Project. The taking was in the public interest and was for the public purposes identified in the resolution:

(a) The creation of jobs for all segments of the Wayne County work force, including the establishment of work force participation standards, requirements, procedures and mechanisms which assure that workers from economically distressed areas of the County shall have an equal opportunity for jobs made available by the Project and by similar projects which are enabled by the Project;

(b) The diversification of investment and business opportunities for all segments of the County's business community;

(c) The stimulation of private investment and redevelopment in the County to insure a healthy and growing tax base so that the County can fund and deliver other critical public services;

(d) Stemming the past tide of population loss and disinvestment;

(e) Supporting development opportunities that would otherwise remain unrealized;

(f) Development of public recreational facilities and open use lands;

(g) The construction, improvement and maintenance of public roads and highways;

(h) The construction, improvement and maintenance of storm drainage ditches and other storm drainage facilities;

(i) The construction of facilities which will directly assist in allowing the expansion of Detroit Metropolitan Wayne County Airport, including without limitation, the construction of Runway 4/22. *Id.*

In filing these condemnation actions, Wayne County relied on 1911 PA 149 (MCL 213.21, *et seq.*). The specific language upon which the County relies upon is codified in MCL 213.23 and 213.24 as follows:

> Any public corporation or state agency is authorized to take private property for a public improvement or for the purposed of its incorporation or for public purposes within the scope of its powers for the use or benefit of the public and to institute and prosecute proceedings for that purpose. (MCL 213.23).
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> * * *

> The provisions of this act [1911 PA 149] shall be deemed to extend to and include the right to acquire and take the fee to property; to acquire property adjacent to that required for public highway purposes for the purpose of exchanging it for the property required or for the purpose of replatting or re-arranging the property abutting on the highway after the taking so as to conform with the plan or arrangement in effect before taking. (MCL 213.24).

Following the evidentiary hearing on the necessity of the taking, defendants filed a motion for summary disposition. The trial court denied defendants' motion, holding that plaintiff could proceed with the condemnation and taking. (Opinion, Plt Apx 917a). Defendants' motion for reconsideration was also denied. In an unpublished *per curiam* opinion, the Michigan Court of Appeals affirmed the trial court's denial of Defendants' challenges to Wayne County's condemnation action. *County of Wayne v Hathcock*, unpublished opinion per curiam of the Court of Appeals decided April 24, 2003 (Docket Nos. 240195, *et al.*). Following denial of a motion for reharing, Defendants applied for leave to appeal to the Michigan Supreme Court. By Order dated November 17, 2003, this Court granted Defendants' application for leave to appeal.

ARGUMENT

The Michigan Constitution does not require a "predominant" public benefit to justify the taking of private property. This Court should overrule Poletown and subsequent courts that have applied *Poletown's* erroneous doctrine of requiring a "predominant" public benefit.[3] The "public purpose" and "heightened scrutiny" tests attributed to *Poletown* and applied by subsequent courts are contrary to long standing Michigan eminent domain law, and have expanded the scope of judicial review of condemnation actions. Dearborn submits that the state of eminent domain law in Michigan has reached an untenable imbalance with ambiguity strikingly similar to the situation that

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[3] *See City of Novi v Robert Adell Childrens Funded Trust*, 253 Mich App 330; 659 NW2d 615 (2003); *City of Center Line v Chmelko*, 164 Mich App 251; 416 NW2d 401 (1987); *Tolksdorf v Griffith*, 464 Mich 1; 626 NW2d 163 (2001); *City of Lansing v Edward Rose Realty*, 442 Mich 626; 502 NW2d 638 (1993).

this Court faced relating to the scope of judicial review of local zoning decisions. *See Schwartz v City of Flint*, 426 Mich 295; 395 NW2d 678 (1986). Much like the *Schwartz* Court did almost 20 years ago, this Court should act to restore the constitutional balance between the function of the legislature and the role of the judiciary.

Dearborn aks that the Court clarify and restore Michigan condemnation law to conform with the Michigan and United States Constitutions; the decisions of the Michigan Supreme Court prior to *Poletown*; the decisions of the United States Supreme Court; the traditional scope of judicial review of government action; and the Legislature's intent to provide for limited, expeditious judicial review of condemnation actions.

As a result of the doctrine created by appellate decisions after *Poletown*, this state's courts are now mired in a *de novo* review of every aspect of public projects, the purposes for the project and the acquisition, and the necessity of takings. The practical effect of the "public purpose" and "heightened scrutiny" doctrines have forced courts to engage in an exercise of weighing public and private interests that the court is ill-equipped to do and is the proper function of state and local legislative bodies. *See, e.g., Schwartz, supra.*

As is particularly evidenced by the procedural history of this case, the courts are now engaging in ad hoc bench trials to, in essence, reconsider the public policy decisions of legislative bodies, and contrary to the Legislature's intent and statutory scheme of the Uniform Condemnation Procedures Act, 1980 PA 87; MCL 213.51, *et seq.*("UCPA"). Condemnation actions to acquire private property for public projects (that may involve private entities) have become a "role of the dice" dependent solely upon the court's judgment as to the "predominance" of interests. This judicial governance puts important public projects at risk and leaves local officials unable to determine with any degree of certainty whether a public project will be able to proceed timely or at

all if it involves condemnation. Although judicial review of the public purpose and necessity justifying the taking of an owner's property is essential to prevent an abuse of government power, that review must take place within the context of established jurisprudence and statutory procedures for reviewing the propriety – not the wisdom – of government actions.

The government's eminent domain power is no different in kind than the exercise of any of the other governmental powers that impact upon the rights, liberties, and lives of its citizens.[4] As the United States Supreme Court stated, in *Hawaii Housing Authority v Midkiff*, 467 US 229, 242-243; 104 S Ct 2321; 81 L Ed2d 186 (1984), "*When the legislature's purpose is legitimate and its means are not irrational, our cases make it clear that empirical debates over the wisdom of takings - - no less than debates over the wisdom of other kinds of socioeconomic legislation - - are not to be carried out in the federal courts.*" By requiring Michigan courts to determine a "predominance" of interests, the *Poletown* "public purpose" test forces courts to second-guess legislative public policy decisions – and thus should be overruled.

Specifically responding to each of the issues stated in this Court's November 17, 2003, Order, Dearborn asserts:

I. MCL 213.23 delegates the power of eminent domain to public corporations (such as Plaintiff) and is, on its own, sufficient authority for instituting condemnation proceedings notwithstanding other statutes also authorizing condemnation of private property;

II. Michigan and federal eminent domain law have recognized that the transfer of property acquired by condemnation to a private entity does not invalidate the public purpose for the taking;

III. The *Poletown* public purpose test is not consistent with Const 1963, art 10, § 2, and should be overruled; and

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[4] *See, e.g., Poletown, supra* at 634 ("Eminent domain is an inherent power of the sovereign of the same nature as, albeit more severe than, the power to regulate the use of land through zoning or the prohibition of public nuisances"); and *Hawaii Housing Authority v Midkiff*, 467 US 229, 240; 104 S Ct 2321; 81 L Ed2d 186 (1984)(the "public use" requirement is coterminous with the scope of a sovereign's police powers").

IV. A decision overruling *Poletown* may be applied retroactively if it clarifies and restores pre-existing Michigan condemnation law erroneously applied by courts following *Poletown*.

I. MCL 213.23 DELEGATES THE POWER OF EMINENT DOMAIN TO PUBLIC CORPORATIONS AND IS, ON ITS OWN, SUFFICIENT AUTHORITY TO CONDEMN PROPERTY NOTWITHSTANDING OTHER STATUTES ALSO AUTHORIZING CONDEMNATION OF PRIVATE PROPERTY.

This issue involves a question of statutory interpretation. Statutory interpretation is a question of law reviewed *de novo* on appeal. *Haliw v Sterling Heights*, 464 Mich 297; 627 NW2d 581 (2001). If the language used in a statute is clear and the meaning of the words chosen is unambiguous, a common-sense reading of the provision will suffice, and no interpretation is necessary. *Karl v Bryant Air Conditioning Co*, 416 Mich 558; 31 NW2d 456 (1982). The cardinal principle of statutory construction is that courts must give effect to legislative intent. *Morales v Auto-Owners Ins Co*, 469 Mich 487, 490; 672 NW2d 849 (2003). If the Legislature's intent is clearly expressed, no further construction is permitted. *Id.* Under such circumstances, a court is prohibited from imposing a 'contrary judicial gloss' on the statute. *Id.*

The power of eminent domain is an inherent right of sovereignty, but may not be exercised by lesser political subdivisions of the state absent an express delegation of authority or by implication from delegated authority.[5] Since its enactment over 90 years ago, 1911 PA 149 (MCL 213.21, *et seq.*)(hereinafter "Act 149") has been uniformly relied upon as just such a delegation of authority. Michigan case law has likewise uniformly recognized MCL 213.23 [§ 3 of Act 149] as authority to take private property.[6] The statute grants public corporations and state agencies the

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[5] *See City of Lansing v. Edward Rose Realty*, 442 Mich 626; 502 NW2d 638 (1993);

[6] *See Edward Rose Realty, supra*; *Charter Twp of Delta v Eyde*, 389 Mich 449; 208 NW 2d 168 (1973); *Western Michigan University Bd of Trustees v. Slavin*, 381 Mich 23; 158 NW2d 884 (1968); *Union School Dist for Jackson v Star Commonwealth for Boys*, 322 Mich 165; 33 NW2d 807 (1948); *In Re Gallagher Avenue*, 300 Mich 309; 1 NW2d 553 (1942); *In Re Warren Consolidated Schools*, 27 Mich App 452; 183 NW2d 587 (1970); and *State Highway Commission v. Drouillard*, 6 Mich App 605; 149 NW2d 903 (1967) .

discretion to determine when the "use or benefit of the public" requires the acquisition of private property.[7] MCL 213.23 may be relied upon as the sole authority for instituting condemnation proceedings notwithstanding that other statutes also authorize condemnation of private property.[8]

The fact that the Legislature has enacted various other statutes specifically declaring what the State Legislature has determined to be particular "public improvements" and "public purposes" for which private property may be condemned does not diminish the Legislature's general grant of discretion to local political bodies to make similar determinations under MCL 213.23.[9] The delegation and exercise of such broad discretion is essential for state agencies and local government to accomplish public projects and properly fulfill their duties to the public. The condemnation authority should be exercised by those local bodies most closely related to and familiar with the particular circumstances in their respective communities that give rise to the need for acquiring private property "for the use or benefit of the public". There is no mystery over the language and intent of the statute. Its terms are plain and the intent is manifest.

Defendants' argue that MCL 213.23 requires additional statutory condemnation authority. If adopted, this interpretation would eliminate local legislative discretion and require the State Legislature to enact a separate, specific statute to cover every individual myriad circumstance under which it may be necessary to acquire private property for a public purpose. Such pervasive state legislative oversight is obviously impossible – and, even if it were possible, is certainly ill-advisable. Local government is best equipped to meet the ever-changing challenges presented within their respective communities and similarly best suited to adapting the means to meet those challenges.

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[7] *See Edward Rose Realty, supra.*

[8] *See, e.g., In Re Gallagher Avenue, supra.*

[9] *See Edward Rose Realty, supra*; and *In Re Gallagher Avenue, supra* at 312-313.

The prudent exercise of the eminent domain power is essential to promoting the community's health and welfare. The Legislature has so provided in MCL 213.23 and this Court should reject a construction of this statute that would defeat the Legislature's intent and bar public corporations from exercising the same authority and discretion granted them in every other facet of local government.

Like many of the Public Acts relating to condemnation of private property enacted prior to the UCPA in 1980, Act 149 was the source of both substantive and procedural condemnation law. The procedural provisions of Act 149, as well as the state's other condemnation procedural statutes, were repealed by the UCPA.[10] But the substantive grant of the condemnation power in Act 149 remained by not repealing MCL 213.21 thru MCL 213.25. At the time it enacted the UCPA, the Legislature implicitly recognized and intended that public agencies continue to rely upon the substantive authority to condemn private property conferred by the surviving statutes.

Defendants' argument that public corporations must search for other statutory authority authorizing the taking of private property for a specific, identified purpose is contradicted by the statute itself. The plain language of MCL 213.23, in pertinent part, is clear and unambiguous:

> Any public corporation or state agency is authorized to take private property necessary for a public improvement or for the purposes of its incorporation or for public purposes within the scope of its powers for the use or benefit of the public and to institute and prosecute proceedings for that purpose.

As expressly stated, MCL 213.23 authorizes public corporations and state agencies to take private property; provided that the taking satisfies two threshold requirements and that it is for one

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[10] *See* MCL 213.75; and *see* 1980 PA 87 (former MCL 213.76 and 213.77 repealing, *inter alia*, the procedural provisions of Act 149 contained in former MCL 213.26 thru 213.41).

of three reasons.[11] The threshold requirements are that the taking be: (1) necessary; and (2) for the use or benefit of the public.[12] If these conditions are met, the statute authorizes public corporations and state agencies to take private property for one of three reasons: (1) a public improvement; or (2) the purposes of its incorporation; or (3) a public purpose within the scope of its powers. No other construction of the statute is reasonable.

The phrase "within the scope of its powers" contained in the third reason authorizing the taking simply modifies the term immediately preceding it, i.e., "for a public purpose". The purpose of this modifier is straightforward – a public corporation or state agency is not authorized to condemn private property for a "purpose" the agency otherwise has no authority to undertake.[13] This interpretation is consistent with, and supported by, the language of the other provisions of Act 149 in which the phrase "within the scope of its powers" is used in direct connection with the term "public purposes". *See* MCL 213.24 and MCL 213.25. Simply, the "purpose" for the taking must be "within the scope of [the agency's] powers" – not the taking itself.

This Court has previously considered the scope of the eminent domain power authorized under Act 149, in *City of Lansing v Edward Rose Realty, supra*, and found it is a "*broad, general enabling statute*" under which the city was given the discretion to determine the "public purposes"

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[11] The omitted second and third sentences of the statute apply only to "state agencies", as defined by MCL 213.21, and separately authorize those agencies to condemn private property when the legislature has appropriated funds to acquire land for a "designated public purpose". This separate delegation of authority does not diminish or, in any way, affect the grant of authority to condemn private property for the reasons stated in the first sentence.

[12] These requirements are not remarkable because the statute merely echoes the constitutional limitations on the eminent domain power under the 1908 Constitution in effect at the time the statute was enacted in 1911. *See* Const 1908, art 13, § 1and 2.

[13] For example, a municipality could not condemn private property for an interstate highway, or for a state university, or for a national park, etc. *See also People ex rel Trombley v Humphrey*, 23 Mich 471 (1871).

for which condemnation was then authorized by the statute.[14] Notably, the Court found that "*the Legislature did not delegate to the city the power to condemn private property for the purpose of providing mandatory access by a city-franchised cable system*", but the Court did not reject the condemnation for that reason.[15] Rather, the Court implicitly found that the city was authorized to take under MCL 213.23 because the asserted "purpose" for the taking (i.e., facilitating public broadcast services) was within the scope of the city's home rule powers. This case is dispositive that separate statutory authority is not required to make the taking of private property "within the scope of [the agency's] powers".

Notwithstanding the Court's decision in *Edward Rose*, if Defendants' interpretation is accepted, MCL 213.23 is rendered moot. If state agencies and public corporations were forced to identify some other delegation of the eminent domain power to demonstrate the taking was "within the scope of its powers," then the authority granted by MCL 213.23 would be meaningless. Furthermore, the Legislature would have to adopt statutory authority describing each and every conceivable public purpose under which a political subdivision could exercise the eminent domain power. In short, if MCL 213.23 is held invalid, the Legislature would essentially have to re-enact the same general condemnation statute.

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[14] *See Edward Rose* at 632-633 ("[city] may commence condemnation proceedings when it has 'declared ... public purposes within the scope of its powers make it necessary, and ... that it deems it necessary to take private property for such ... public purposes within the scope of its powers ...") quoting MCL 213.24.

[15] If the Court accepts Defendants' argument that an agency has no power to condemn property under MCL 213.23 without a separate express delegation of power from the Legislature, then the *Edward Rose* Court's analysis should have stopped here. According to Defendants' argument, the absence of such an express delegation of the eminent domain power would have rendered the condemnation invalid.

As stated *supra*, Michigan courts have held that condemnation proceedings instituted under MCL 213.23 are valid even though other statutes authorizing the condemnation were available.[16] Public corporations and state agencies do not need to identify any other statutory authority to justify taking private property under MCL 213.23. Defendants' arguments in this regard are without merit and contrary to settled precedent, and should similarly be rejected here. The Court need look no further than the language of the statute itself and the prior decisions of this Court.[17]

In sum, the delegation of the broad condemnation power under MCL 213.23 is essential to allow public corporations to exercise the discretion necessary to protect and improve their local communities by acquiring private property necessary for the use or benefit of the public. The State Legislature's declaration of a particular "public improvement" or "public purposes" in other statutes does not abrogate the authority and discretion granted under MCL 213.23. If the facts demonstrate that Wayne County satisfies the requirements of "necessity" and "use or benefit of the public," and the taking is for one of the statutory reasons, then MCL 213.23, alone, grants Wayne County the authority to acquire Defendants' properties by condemnation.

II. MICHIGAN AND FEDERAL EMINENT DOMAIN LAW HAVE RECOGNIZED THAT THE TRANSFER OF PROPERTY ACQUIRED BY CONDEMNATION TO A PRIVATE ENTITY DOES NOT INVALIDATE THE PUBLIC PURPOSE FOR THE TAKING.

The taking of Defendants' properties by Wayne County should not be invalidated solely because the property will ultimately be transferred to a third party. "The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose." *Midkiff, supra* 467 US at 243-244. Neither

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[16] *See In re Gallagher Avenue*, 300 Mich 309, 312-313; 1 NW2d 553 (1942); and *In Re Warren Consolidated Schools*, 27 Mich App 452, 453-454; 183 NW2d 587 (1970).

[17] *See Morales v Auto-Owners Ins Co*, supra at 490.

the Michigan or United States Constitutions, Act 149, nor any other Michigan statute or case law, prohibit the transfer of condemned property to a private party; provided that the taking is for a public use.[18] The transfer of the property to a private party is not determinative of whether the taking is for a public use.[19] The Michigan appellate courts and the United States Supreme Court consistently have recognized the principle that private benefits resulting from the exercise of the power of eminent domain, even to the extent where the property is transferred to another private entity, does not undermine the public character of the purpose justifying the taking. Nor should this Court now place such an overly restrictive limitation on the eminent domain power that is contrary to the overwhelming body of Michigan and federal condemnation law.

Michigan courts historically have upheld condemnations that result in the transfer of property from one private party to another where the object of the taking was for a public use. *See, e.g., Swan v Williams*, 2 Mich 427 (1852)(the constitutionality of an act authorizing railroad to condemn private property upheld),[20] *Lakehead Pipe Line Co v Dehn*, 340 Mich 25; 64 NW2d 90 (1954)(upheld an act permitting a private oil company to condemn private property for its pipe line), *In re Slum Clearance*, 331 Mich 714; 50 NW2d 340 (1951)(upheld condemnation actions even though property would be transferred to private entities for redevelopment),[21] and *Detroit International Bridge Co v American Seed Co*, 249 Mich 289; 228 NW 791 (1930)(an act authorizing

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[18] In fact, § 22 of the UCPA states, "if property is acquired by an agency, the agency may lease, sell or convey any portion not needed, on whatever terms the agency considers proper". MCL 213.72.

[19] *See, e.g., In re Slum Clearance*, 331 Mich 714, 721-722; 50 NW2d 340 (1951)(fact that a governmental entity eventually transfers condemned property to a private entity is not dispositive of the issue of public purpose).

[20] *See People ex rel Detroit & Howell R Co v Salem*, 20 Mich 452 (1870) for Justice Cooley's discussion of the purely private character of railroad corporations and their property interests; and *see Grand Rapids N&LS RR Co v Grand Rapids & Indiana R Co*, 35 Mich 264 (1877)(holding that public does not own property acquired by railroad and railroad cannot be compelled to surrender property for a public use without just compensation).

[21] *See also In re Brewer Street Housing Site*, 291 Mich 313; 289 NW 493 (1939).

a private company to condemn property for a bridge and approaches upheld).

Even in those cases prior to *Poletown* where the Court rejected the condemnation involving the transfer of property to a private entity, the Courts did not do so solely on the basis of later private ownership of the property, but rather because the object of the taking was for a private use. *See, e.g., Board of Health v Van Hoesen*, 87 Mich 533; 49 NW 894 (1891), *Berrien Springs Water-Power Co v Berrien Circuit Judge*, 133 Mich 48; 94 NW 379 (1903), and *Shizas v City of Detroit*, 333 Mich 44; 52 NW2d 589 (1952). After *Poletown*, however, the court's focus shifted from the object of the taking to a judicial attempt to determine the predominant beneficiary of the taking. *See, e.g., Tolksdorf v Griffith*, 464 Mich 1; 626 NW2d 163 (2001), and *Edward Rose Realty, supra*.

Contrary to the assertion of Defendants and their *Amici*, this Court's decisions do not support the conclusion that, in the case of transfer of the property to a private entity, the public must retain some right of actual use of the property in order to satisfy the public use requirement of the Constitution. Rather, as Justice Cooley stated, the asserted public use must be a public use in fact. *See Ryerson v Brown*, 35 Mich 333, 338 (1877). The public thus has the right to require that the public benefits to be accomplished by the transfer will, in fact, be realized and will not be subverted by the whimsy or caprice of the private entity acquiring the property. *See Salem, supra* at 482-483. This objective, however, can be accomplished in a variety of different ways, including statutory regulation, executive administration, or by contract. But in no sense does the public's right to ensure that the benefits of the taking be realized require that the public retain the actual use, or right of use, to property after the transfer. Exemplary of this distinction, Justice Cooley, in *Salem*, took pains to dispel the fiction that railroad corporations were, in any sense, agents of the public or that the public retained any rights in property acquired by railroad corporations by eminent domain. *See also Grand Rapids N&LS RR Co v Grand Rapids & Indiana R Co, supra*.

Additionally, it cannot be maintained that, in order to justify exercise of the eminent domain power, the right of the public to ensure the benefits of the taking are realized requires that such uses continue into perpetuity. It is sufficient to satisfy the public trust that the property be devoted to a particular use (whether public or private) for such a duration as is reasonably calculated to accomplish the public benefit for which the property was taken and to justify the expenditure of public funds to realize it. This Court's decisions in *Lakehead Pipe Line, supra*, and *International Bridge, supra*, illustrate the Court's concern for ensuring that the public retain some tangible right in which the property be devoted to accomplishing the purposes for which it was acquired. But these decisions do not imply nor compel the conclusion that this right, or the use, be maintained in perpetuity.

For example, in the circumstances of *International Bridge, supra*, the public benefits, that are derived from facilitating international commerce, are achieved by the construction of the bridge and maintenance of the bridge for some reasonable duration. Likewise, in the circumstance of *Lakehead Pipe Line*, the public benefits derived from facilitating transportation of oil are achieved by constructing the pipe lines and maintaining that use for a reasonable duration. In each of those cases, this Court found that the state's police power and the statutory provisions were sufficient to protect the right of the public to benefit from the taking. The same can be said of other circumstances in which the public welfare is sought to be advanced through cooperation with private enterprise (e.g., utilities, railroads, urban redevelopment, economic revitalization, etc). The logic of this standard is further supported by consideration of the fact that, even in cases where property is taken for a strictly public use (e.g., a road, a public building, a public park), the government has the right to discontinue that use at any time and may even later sell, lease or convey such property to private interests in the future.

Defendants' *Amici*'s attempts to distinguish this Court's holdings in cases of slum clearance are tailored to support a predetermined position. Slum clearance is conceptually no different than the situation presented in *Poletown* and in the case *sub judice*. In each instance, there is no vestige of actual public use or control over the condemned property after the taking. Hence, the argument favoring maintenance of some right of public use of the property after the condemnation, independent of the will of the ultimate owner, is dispatched by the Court's decision in *In re Slum Clearance, supra*.

The United States Supreme Court's decisions interpreting the public use requirement contained in the Fifth Amendment of the U.S. Constitution have upheld condemnations where property is transferred from one private party to another where the object of the taking was to advance a legitimate public interest. *See, e.g., Hawaii Housing Authority v Midkiff, supra* (condemnation of private property to transfer to a different private owner to alleviate concentrated land ownership), *Berman v Parker*, 348 US 26; 75 S Ct 98; 99 L Ed 27 (1954), *Rindge Co v County of Los Angeles*, 262 US 700; 43 S Ct 689; 67 L Ed 1186 (1923)(rejecting argument that a use is a public use only if the property taken is put to use for the general public), *Block v Hirsh*, 256 US 135; 41 S Ct 458; 65 L Ed 865 (1921)(same), *Strickley v Highland Boy Gold Mining Co*, 200 US 527; 26 S Ct 301; 50 L Ed 581 (1906)(condemnation of private property for tramway owned by private corporation), and *Clark v Nash*, 198 US 361; 25 S Ct 676; 49 L Ed 1085 (1905)(condemnation of private property for irrigation of other land belonging to one private individual).

Privately owned railroads, utilities, gas and oil pipelines, and bridges serve no greater public benefit than the public's interest in ensuring the economic stability and general health of the community. The public benefits of economic revitalization, urban redevelopment and elimination

of blight are as tangible and important to the community as electricity, water, and transportation.[22] To effectively accomplish these vital public interests, the state and local government may find it advisable to cooperate with private enterprise to accomplish the public purpose, as in the case of public utilities. Like the police power, the power of eminent domain is an attribute of government necessary to protect and promote the public health, safety, welfare and morals. The takings clause should not be so narrowly construed as to nullify the government's ability to accomplish its fundamental purposes. The limitation of governmental power should not impair the ability to accomplish the purposes of its taking power.

The single unifying principle at the heart of Michigan's eminent domain case law is the court's primary concern for ensuring that the taking of private property is, in fact, for a public use. The courts have addressed this question by looking at the **direct object** of the taking as the central factor in determining whether the character of the condemnation is public or private. The fact property will ultimately be transferred to, or originally taken by, a private entity for its own use is not determinative of this question and does not invalidate what would otherwise be a public use justifying exercise of the eminent domain power.

III. THE *POLETOWN* "PUBLIC PURPOSE" TEST IS NOT CONSISTENT WITH CONST 1963, ART 10, § 2, AND SHOULD BE OVERRULED.

The *Poletown* "public purpose" test should be overruled, but not for the reasons advanced by Defendants and their *Amici*. Michigan's condemnation jurisprudence faces a present and tangible crisis. The manner in which courts have applied *Poletown* has distorted the constitutional balance between the legislature and the judiciary to such an extent that the courts are now, for all practical

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[22] *See, e.g.*, Blighted Area Rehabilitation Act, 1945 PA 344; MCL 125.71, *et seq.* (*see* MCL125.71); Economic Development Corporations Act, 1974 PA 338; MCL 125.1601, *et seq.* (*see* MCL 125.1602); Urban Redevelopment Corporations Law, 1941 PA 250; MCL 125.901, *et seq.* (*see* MCL 125.902); and Downtown Development Authority Act, 1975 PA 197; MCL 125.1651, *et seq.* (*see* MCL 125.1651a).

purposes, sitting in the place of local legislative bodies. Not only is this constitutionally unacceptable, but it undermines the limited role of judicial review of condemnation proceedings. The judicial review of condemnation proceedings currently being carried on in the state's courts has gone far beyond the statutory scheme of the UCPA of the constitutional protections of Const 1963, art 10, § 2.

Poletown should be overruled because the language of Const 1963, art 10, § 2, does not require that the public benefit justifying the condemnation "predominate" over any specific, identifiable private interest. The Constitution only requires that the taking be for a "public use". Determinations of "public use" do not rise or fall based upon who stands to receive the greatest benefit. If the public benefit is the **object** of the taking, then any private benefit (no matter how significant) is merely incidental and does not undermine the public character of the condemnation. The converse is also true. This is the test of the constitutionality of the taking of private property.

A. The *Poletown* "Public Purpose" Test.

Poletown began as a necessity challenge. The trial court held that the City of Detroit and its Economic Development Corporation did not abuse its discretion in determining that the condemnation of plaintiffs' properties was necessary to complete the project. *Id.* at 628. This Court granted leave to appeal to consider, inter alia, whether "the use of eminent domain in this case constitutes a taking of private property for private use and, therefore, contravene Const 1963, art 10, § 2". *Id.* Specifically, this Court considered whether the city's use of its eminent domain power to acquire private property and transfer it to General Motors Corporation constituted a public purpose under the auspices of the Economic Development Corporations Act (MCL 125.1601, *et seq.*). To further the objectives of the Act, the Legislature had authorized municipalities to acquire property in the manner undertaken by the City of Detroit. MCL 125.1622.

This Court concluded that because the Legislature had determined that the government action of the type undertaken by the City was a public purpose, the Court's role after such a determination is made is limited. *Poletown* at 630-631. The Court went on to state:

> The United States Supreme Court has held that when a legislature speaks, the public interest has been declared in terms "well-nigh conclusive". *Poletown* at 633; *citing Berman v Parker*, 348 US 26, 32; 75 S Ct 98; 99 L Ed 27 (1954).
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> In the instant case the benefit to be received by the municipality invoking the power of eminent domain is a clear and significant one and is sufficient to satisfy this Court that such a project was an intended and a legitimate object of the Legislature when it allowed municipalities to exercise condemnation powers even though a private entity will also, ultimately, receive a benefit as an incident thereto. *Poletown* at 634.

The Court's held that the City's project fell within the public purposes stated by the Legislature.

Subsequent appellate decisions have since devised a test of whether a condemnation is constitutional that rests upon a determination whether the "public benefit predominates over a private benefit". This test has been ascribed to *Poletown*. It is arguable, however, whether *Poletown* ever announced any such "public purpose" test of the power of eminent domain.[23] The *Poletown* Court stated:

> There is no dispute about the law. All agree that condemnation for a public use or purpose is permitted. All agree that condemnation for a private use or purpose is forbidden. Similarly, condemnation for a private use cannot be authorized whatever its incidental public benefit and condemnation for a public purpose cannot be forbidden whatever the incidental private gain. *The heart of this dispute is whether the proposed condemnation is for the primary benefit of the public or the private user. Id.* at 632 (emphasis supplied).

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[23] *See Poletown, supra* at 632, 634-635.

In affirming the condemnation, the *Poletown* Court concluded that the power of eminent domain could be exercised for the legitimate public purpose of economic revitalization, and that the City of Detroit's project satisfied the objects of the public purpose as defined by the Economic Development Corporations Act. In reaching its decision, the Court did not utilize an analysis focusing on the "predominance" of benefits. Rather, the Court expressly found that the taking was for the primary – not predominate – benefit of the public, and that any private benefits (no matter how great) were merely incidental to the purpose for the taking. The Court *held*:

> The power of eminent domain is to be used in this instance *primarily to accomplish the essential public purposes* [i.e., the object] of alleviating unemployment and revitalizing the economic base of the community. The benefit to a private interest is merely incidental. *Id.* at 634 (emphasis supplied).

This holding was consistent with the long history of Michigan's eminent domain law focusing on the **object** of the taking as the key factor determining whether a use is public or private.[24]

Subsequent courts, however, have misapplied *Poletown* to conclude that the degree of benefit determines whether the taking is for a public (constitutional) or private (unconstitutional) use. Courts have utilized the language at the end of the *Poletown* opinion:

> Where ... the condemnation ... benefits ... private interests, a court inspects with heightened scrutiny the claim that the public interest is the *predominant* interest being advanced. *Id.* at 634-635 (emphasis supplied).

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[24] The clarification of the terminology is important. Using the term "object" implies a quality, while the terms "primary" and "predominate" are too easily mistaken for implying a quantity. In fact, this is precisely the mistake subsequent courts have made in fashioning the "public purpose" and "heightened scrutiny" tests. Using the term "object of the taking" may eliminate confusion in determining public use. For example, stating that "if the object of the taking serves a public benefit, it is constitutional" seems less apt to confuse than stating "if the taking serves a primary/predominate public benefit, it is constitutional". Qualifying the taking, rather than quantifying the beneficiary, removes much of the potential for ambiguity and misinterpretation.

In *City of Center Line v Chmelko*, 164 Mich App 251; 416 NW2d 401 (1987), the Michigan Court of Appeals selected language from *Poletown* to create the so-called "heightened scrutiny" test. In reviewing the trial court's determination that no necessity existed justifying the taking of the property, the *Chmelko* court approved the standard applied by the trial court, adopted from *Poletown*, for reviewing the issue of necessity for the taking.

In *Poletown* our Supreme Court ruled:

> Where, as here, the condemnation power is exercised in a way that benefits specific and identifiable private interests, a court inspects with heightened scrutiny the claim that the public interest is the predominant interest being advanced. Such public benefit cannot be speculative or marginal but must be clear and significant if it is to be within the legitimate purpose as stated by the Legislature.

> In ruling, the trial court applied this standard to the facts here presented ... We believe that the proofs at the hearing indicate that the city's determination [of necessity] was either fraudulent or an abuse of discretion, especially under the heightened scrutiny test of *Poletown*. *Id.* at 257

Notably, *Chmelko* did not apply this so-called "heightened scrutiny" test to determining whether the taking was for a public use, but rather only in reviewing the city's determination of necessity .[25]

In *City of Lansing v Edward Rose Realty*, 442 Mich 626; 502 NW2d 638 (1993), this Court considered whether a condemnation, which would benefit a private interest, was constitutional as being for a public use/purpose. Unlike the *Chmelko* court, the *Edward Rose* Court adopted the same *Poletown* language and applied it directly to determine whether the taking was for a public use (rather than the determination of necessity). Although the *Edward Rose* Court believed that the

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[25] The issues of "necessity" and "public use" in condemnation actions are separate, distinct questions. *See, e.g., Cleveland v City of Detroit*, 322 Mich 172; 33 NW2d 747 (1948)l and *State Highway Commission v Vanderkloot*, 392 Mich 159; 220 NW2d 416 (1974). *See also City of Detroit v Lucas*, 180 Mich App 47, 53; 446 NW2d 596 (1989)[also applying the *Poletown* "heightened scrutiny" test only in the context of the court's review of the necessity for the taking].

taking advanced a legitimate public purpose (which should have ended the inquiry), it still found the taking unconstitutional because the Court determined that the benefit to a private interest predominated over the asserted public benefit.

> Although we assume the validity of the public interest advanced by the city, we find that the private interest to be benefitted predominates over the asserted public interest. The asserted pubic interest therefore does not justify the proposed taking of private property by the city. *Id.* at 635.
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> We are persuaded that this benefit to Continental predominates over the asserted public benefits. The ordinance and resolutions are therefore invalid as unreasonable because the public would not be the primary beneficiary. Hence, the proposed conduct is beyond the city's authority to exercise the power of eminent domain. *Id.* at 644.

More recently, in *Tolksdorf v Griffith*, 464 Mich 1; 626 NW2d 163 (2001), this Court reviewed whether the Private Roads Act was unconstitutional as a taking of private property for a private use. Again departing from the *Chmelko* court's application of *Poletown* strictly in the context of reviewing the "necessity" for the taking, the *Tolksdorf* Court, relying upon the same language of *Poletown*, framed the question solely in terms of who (not whether) would receive the predominate benefit, the public or a private party. The Court held the Act unconstitutional based upon its finding that the private party received the predominate benefit.

Finally, in *City of Novi v Robert Adell Childrens Funded Trust*, 253 Mich App 330; 659 NW2d 615 (2003), the Michigan Court of Appeals considered whether the city's taking of private property for a road was for a public use/purpose. Again applying the same language of *Poletown*, the *Adell* court found that the primary beneficiary of the road was a private entity and, therefore, the city's condemnation was unconstitutional. The *Adell* court stated:

> In *Poletown* ... the Michigan Supreme Court stated that "whether the proposed condemnation is for the primary benefit of the public or the private user" determines if the taking is constitutional. *Id.* at 335.

This standard of review of the constitutionality of the condemnation is an erroneous application of *Poletown*. The actual language of *Poletown* does not support this standard. In *Poletown, supra* at 632, the Court stated "the heart of this dispute is whether the proposed condemnation is for the primary benefit of the public or the private user." This sentence, however, cannot be taken out of context of the Court's immediately preceding recitation of the general eminent domain law: "condemnation for a private use cannot be authorized *whatever* its incidental public benefit and condemnation for a public purpose cannot be forbidden *whatever* the incidental private gain". *Id.* (emphasis supplied). The *Poletown* Court's framing of the issue simply follows its statement of the well-established law that the constitutionality of the taking is determined by the purpose for the taking – not by who stands to receive the greater benefit.

The *Adell* court's misinterpretation of *Poletown*, just as the *Edward Rose* court did, led both courts to conclude that a condemnation that was for an otherwise valid public purpose was unconstitutional because a private entity stood to receive a greater benefit than the public:

> Although we assume the validity of the public interest advanced by the city, we find that the private interest to be benefitted predominates over the asserted public interest. The asserted public interest therefore does not justify the proposed taking of private property by the city. The taking was thus unconstitutional. *Adell* at 355.

The "public purpose" test (i.e., predominance of interests) thus developed by these decisions is a complete departure from Michigan condemnation jurisprudence prior to *Poletown* and, ultimately, is not consistent with the language of the Michigan Constitution.

B. The Constitutional Test of Eminent Domain.

Const 1963, art 10, § 2, in pertinent part, provides: *"private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law"*. Under the Michigan Constitution, the government may condemn private property for a "public use" upon payment of just compensation. The government may not condemn private property for a private use regardless of compensation. *See, e.g., Shizas v City of Detroit*, 333 Mich 44, 50; 52 NW2d 589 (1952). Thus, the only relevant constitutional limitation on the eminent domain power is that the taking be for a public use and the owner receive just compensation.[26]

The constitutional test for the application of the public use clause of Const 1963, art 10, § 2, to a condemnation case should be as follows:

> **If the object of the taking is for a public use, the taking is constitutional; if the object of the taking is for a private use, it is not constitutional.**

It is the **object** of the taking that determines its essential character (i.e., whether it is public or private). *See, e.g., Swan v Williams, supra.*[27] "Predominance" of interests is not the measure of "public use". Requiring the courts to engage in a quantitative analysis of "predominant" benefits requires the courts to usurp the function of the legislature. The "spectrum" of the appellate courts' condemnation decisions since *Poletown* is illustrative of the difficulties the courts face in analyzing the constitutionality of condemnation actions under a "predominance" standard. Rather, consistent with the way this court and other courts have traditionally defined the metes and bounds of the

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[26] After adoption of the 1963 Constitution deleting the "necessity" language of the 1908 Constitution, the issue of "necessity" was no longer a constitutional limitation on the eminent domain power. *See Vanderkloot, supra.* The "necessity" of the taking remains a statutory requirement. *See, e.g.*, MCL 213.56, and MCL 213.23.

[27] Justice Cooley's discussion of railroad corporations in *Salem, supra*, undermines an argument that condemnation by private corporations is justified solely on a theory of agency. Rather, the important principle put forward in *Swan* is that whether an action is public or private is determined by inquiring into the **object** of the taking. If the object is for a public benefit, the taking is constitutional. If the object is for a private benefit, the taking is unconstitutional.

eminent domain power, the judiciary should conduct a qualitative analysis into the fundamental nature of the acquisition.

As this Court held in *Shizas, supra*, the intention to confer a private benefit cannot form any part of the reason [i.e., object] for the acquisition because it would be tantamount to taking one person's land to give it to another. However, the mere fact that a private party will ultimately benefit from the taking does not vitiate the public character of the purpose for acquiring the property. *See, e.g., In re Slum Clearance, supra*; and *Cleveland v City of Detroit, supra*. The Court's decision in *Shizas* is illustrative of Michigan's eminent domain law prior to *Poletown*, i.e., *condemnation is constitutional if for a public use and whether the taking is for a public or private use is determined by looking at the objective of the taking.*

In commenting on the extent of the eminent domain power and the nature of what constitutes a public use supporting exercise of the power, Justice Cooley set down the essential principles that are as true and applicable today as they were over 100 years ago:

> The eminent domain may be said to be the rightful authority which exists in every sovereignty, to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience and welfare may demand. *Humphrey, supra* at 474.

In *Salem, supra*, Justice Cooley distinguished the eminent domain power, and the purposes supporting it, from that of taxation, and explained:[28]

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[28] The Court should distinguish statements concerning public use and benefit from general statements of necessity. Under prior Michigan Constitutions in effect when the majority of this Court's condemnation cases were decided, the necessity for the public use and the necessity for taking the property for such use were absolute constitutional limitations on the eminent domain power. The 1963 Constitution, however, deleted this limitation and reposed in the legislature the right to determine the necessity of taking private property in the exercise of its discretion, subject only to limited judicial review where provided by statute. *See Vanderkloot, supra.*

> The right of eminent domain is a vital right in every government, and must often be called into exercise when a special necessity demands that the private right in a particular piece of property shall give way for the public good. *Id.* at 479.
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> If we examine the subject critically, we shall find that the most important consideration in the case of eminent domain is the necessity of accomplishing some public good which is otherwise impracticable, and we shall also find that the law does not so much regard the means as the need. The power is much nearer akin to that of the public police power than to that of taxation; it goes but a step further, and that step is in the same direction. *Id.* at 480-481.

And several years later, in *Ryerson v. Brown, supra*, the Court did not find a public necessity to justify the taking. Justice Cooley, however, had occasion to expound upon the exercise of the eminent domain power on behalf of private corporations, and stated:

> We are not disposed to say that incidental benefits to the public could not under any circumstances justify an exercise of the right of eminent domain ... but the authority of the state to compel the sale of individual property for the use of enterprises in which the interest of the public is only to be subserved through conveniences supplied by private corporations or individuals, has been too long recognized to be questioned. In such cases the property is not so much appropriated to the public use as taken to subserve some general and important public policy; and the difference between a forced sale for a reasonable compensation paid and a forced exaction without any pecuniary return [i.e., taxation], is amply sufficient to justify more liberal rules in the former case than in the latter [i.e., eminent domain].

The precedents of the United States Supreme Court defining the scope of the eminent domain power are consistent with this law. When federal and state constitutions contain virtually identical provision, federal construction should be followed absent compelling reasons for expansive interpretation of State Constitution. *See People v Stanaway*,446 Mich 643; 521 NW2d 557 (1994). Michigan's Constitution is substantially similar to the Takings Clause of the United States Constitution. *City of Kentwood v Estate of Sommerdyke*, 458 Mich 642, 656; 581 NW2d 670

(1998); *see also Ziegler v Newstead*, 337 Mich 233, 59 NW2d 269 (1953); and *McKeighan v Grass Lake Twp Supervisor*, 234 Mich App 194; 593 NW2d 605 (1999), overruled on other grounds by *Tolksdorf, supra.*

In *Midkiff, supra*, the United States Supreme Court considered whether a state act authorizing condemnation of private property for transfer from one private owner to another offended the Takings Clause of the Fifth Amendment of the U.S. Constitution, where the statute was buoyed by a substantial public interest in eliminating "evils of concentrated land ownership". The Court upheld the statute as a taking for a public use and analyzed the nature of the eminent domain power and the meaning of public use:

> We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well- nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia ... or the States legislating concerning local affairs.... This principle admits of no exception merely because the power of eminent domain is involved.
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> Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end.... Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. *Id.* 467 US at 239-240; quoting *Berman v Parker*, 348 US 26, 32-33; 75 S Ct 98; 99 L Ed 27 (1954).

> The "public use" requirement is thus coterminous with the scope of a sovereign's police powers. *Midkiff, supra* 467 US at 240.
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> Where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause. *Id.* 467 US at 241.

The United States Supreme Court subsequently affirmed these standards in *National Railroad Passenger Corp v Boston and Maine Corp*, 503 US 407, 422; 112 S Ct 1394; 118 L Ed2d 52 (1992):

> We have held that the public use requirements of the Takings Clause is coterminous with the regulatory power, and that the Court will not strike down a condemnation on the basis that it lacks a public use so long as the taking is rationally related to a conceivable public purpose. *Id.*; *citing Midkiff, supra*; and *Berman, supra*.

See also Ruckelhaus v Monsanto Co, 467 US 986; 104 S Ct 2862; 81 L Ed2d 815 (1984).

This interpretation of "public use" also brings harmony to the fundamentally similar concepts of eminent domain and inverse condemnation/regulatory takings law. Inverse condemnation is merely a reciprocal means of enforcing the public use and just compensation clauses. Property can be taken by regulations imposed under the state's police power the same as if taken outright by eminent domain. If the government under its police power, also premised upon advancing a legitimate public interest, can cause injury and diminution in value to private property without compensation, the government should not be held to a more stringent standard to accomplish a legitimate public interest with compensation. *See, e.g., Webb's Fabulous Pharmacies v Beckwith*, 449 US 155, 163; 101 S Ct 446; 66 L Ed2d 358 (1980)("This Court has been permissive in upholding governmental action that may deny the property owner some beneficial use of his property or that may restrict the owner's full exploitation of the property, if such public action is justified as promoting the general welfare"); *see also Pennsylvania Coal v Mahon*, 260 US 393, 415; 43 S Ct 158; 67 L Ed 322 (1922)(Government could hardly go on if to some extent values incident to

property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power), *Village of Euclid v Ambler Realty Co*,272 US 365; 47 S Ct 114; 71 L Ed 303 (1926)(government police power to zone may cause a diminution in value of property without compensation), *Lucas v South Carolina Coastal Council*, 505 US 1003, 1026; 112 S Ct 2886; 120 L Ed2d 798 (1992)(government must rely upon police power justification "to sustain (without compensation) *any* regulatory diminution in value")(emphasis in original), and *K&K Construction v Department of Natural Resources*, 456 Mich 570; 575 NW2d 531 (1998)(applying U. S. Supreme Court regulatory takings law in Michigan).

As is evident from the decisions of this Court prior to *Poletown* and the decisions of the United States Supreme Court, the eminent domain power is primarily concerned with accomplishing a public benefit. Where the object of taking private property is to accomplish a public benefit, the taking is for a "public use" – regardless of the ultimate ownership and control of the condemned property. This unifying principle of the public benefit as the object of a legitimate exercise of the eminent domain power runs throughout condemnation jurisprudence. This principle was expressly recognized by this Court's holding in *Poletown*. However, subsequent courts have abandoned this primary, determinative consideration and, relying upon certain selective language in *Poletown*, have now departed from consideration of the purpose for the taking in favor of determining the predominate beneficiary of the taking. Dearborn asks this Court to reverse this trend and restore Michigan eminent domain law to its original principles consistent with the justification for the existence of the eminent domain power.

IV. A DECISION OVERRULING *POLETOWN* CAN BE APPLIED RETROACTIVELY IF IT CLARIFIES AND RESTORES PRE-EXISTING MICHIGAN CONDEMNATION LAW ERRONEOUSLY APPLIED BY COURTS FOLLOWING *POLETOWN*.

In consideration of the factors set forth in *Pohutski, supra*, the doctrine of stare decisis does not bar overruling *Poletown* and a decision overruling *Poletown* can be applied retroactively if it clarifies and restores pre-existing eminent domain law erroneously applied by *Poletown* and subsequent appellate courts.

A. *Stare Decisis* Does Not Bar Overruling *Poletown*.

In *Pohutski v City of Allen Park, supra*, relying upon *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000), this Court set forth the relevant factors to be considered in determining whether a prior precedent should be overruled: (1) whether the earlier case was wrongly decided; (2) whether the decision defies "practical workability"; (3) whether reliance interest would work an undue hardship; and (4) whether changes in the law or facts no longer justify the questioned decision. Dearborn addresses each of these factors *seriatim*.

1. The progeny of *Poletown* has been wrongfully applied.

Const 1963, art 10, § 2, restricts the government's exercise of its power of eminent domain by requiring that the taking of private property be for a "public use". Neither the "primacy" nor "predominance" of interests determines whether the taking is for a public use. To the extent that *Poletown* and its progeny have held otherwise, they were wrongly decided and should be overruled.

2. The *Poletown* "Public Purpose" and "Heightened Scrutiny" Tests Defy Practical Workability.

Notwithstanding that the *Poletown* "public purpose" and "heightened scrutiny" tests are inconsistent with Const 1963, art 10, § 2, the prior decisions of this Court, and the decisions of the United States Supreme Court interpreting the public use clause of the U.S. Constitution, these tests

defy practical workability for judicial review of condemnation actions.

It is well-nigh impossible for a court to quantify the "public benefit" from the taking and then attempt to compare and weigh the public versus private benefits of the taking. How does the court make such a decision? Any condemnation action will benefit one private party more than others. How many persons need to benefit for the purpose to be "public" rather than "private"? How can the public benefit of urban redevelopment of Michigan's decaying cities be quantified against the profit motive of private developers who risk their capital and reinvest in redevelopment projects? These competing considerations are best left to the local governing body most familiar with the particular circumstances and best suited to judge the public benefit and when the taking of private property is necessary to advance a public interest. The property owner is protected by the constitutional right to just compensation.

There is nothing inherent in the nature of a condemnation action that warrants "heightened scrutiny" of the constitutionality of state and local legislative public policy decisions. The power of eminent domain, in its essence, derives from the same source and serves the same fundamental purposes as the state's police power. There is no compelling reason why this Court should not apply the same standard of judicial review of condemnation actions as that applied in reviewing the constitutionality of exercises of the police power. It is a well-settled standard the courts of this state are familiar with and is easily applied in the condemnation context. The landowner challenging the public purpose of the project should have the burden of proving that no public purpose exists or that the means exercised (the condemnation) does not advance that public purpose. This Court summarized this standard in *Van Slooten v Larsen*, 410 Mich 21, 42-43; 299 NW2d 704 (1980):

> Defendants claim that the act is unreasonable, arbitrary and capricious, and not a proper exercise of the police power. Accordingly, they carry the burden of overcoming the presumption of constitutionality and must prove either that no public purpose is

> served by the act or that no reasonable relationship exists between the remedy adopted and the public purpose sought to be achieved. The presumption of constitutionality favors validity and if the relationship between the statute and public welfare is debatable, the legislative judgment must be accepted, see Grocers Dairy Co. v. Dep't. of Agriculture Director, 377 Mich. 71, 76, 138 N.W.2d 767 (1966), Carolene Products Co. v. Thomson, 276 Mich. 172, 178, 267 N.W. 608 (1936).

This Court has also applied a similar test of the police power in relation to review of the constitutionality of local zoning decisions. *See Delta Charter Township v Dinolfo*, 419 Mich 253, 268-269; 351 NW2d 831 (1984), affirmed by *Schwartz v City of Flint, supra.* It is further well-settled that state statutes and local ordinances are entitled to a presumption of constitutionality and the burden is on the party challenging the decision to demonstrate a constitutional infirmity. *See, e.g., Gora v City of Ferndale*, 456 Mich 704; 576 NW2d 141 (1998). Where a governmental entity has been delegated the power of condemnation, its resolution of necessity and declaration of a taking for a public purpose should enjoy the same presumption of constitutional validity as any other act of that governmental entity.

There is no reason to abolish the presumption of constitutionality of legislative (state and local) enactments and the judicial deference accorded to acts of legislative discretion in virtually every other sphere of the exercise of government authority merely because the case is one in eminent domain. *See, e.g., Midkiff, supra*; *quoting Berman, supra.*[29]

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[29] Additionally, at least one other jurisdiction has expressly declined to adopt a standard of heightened scrutiny in condemnation actions. See *Minneapolis Community Development Agency v Opus Northwest*, 582 NW2d 596 (Minn Court of Appeals)(1998)("Minnesota courts have not employed a heightened scrutiny standard of review in appeals involving governmental condemnation benefitting private parties ... we reject the invitation to change our well-established and limited standard of review"); citing *City of Duluth v State*, 390 NW2d 757 (Minn Supreme Court)(1986).

3. Reliance Interests Would Not Work Any Undue Hardship.

It is plain that the "public purpose" and "heightened scrutiny" tests attributed to Poletown are more restrictive limitations on the exercise of the eminent domain power than the standard advocated in this brief. Therefore, any condemning authority who relied upon *Poletown* or its progeny (and survived) will not be unduly prejudiced by this Court's adoption of a less restrictive standard by overruling *Poletown* and restoring Michigan eminent domain law consistent with Michigan decisions prior to *Poletown* and the decisions of the United States Supreme Court.

4. Subsequent Appellate Decisions Reinforce the Need to Overrule *Poletown*.

The confusion in Michigan condemnation jurisprudence caused by *Poletown* is particularly evident in the discordant decisions of subsequent appellate courts attempting to follow *Poletown*. For example, the Michigan Court of Appeals in *Chmelko, supra*, and *Lucas, supra*, applied "heightened scrutiny" only in the context of reviewing the necessity for the taking; notwithstanding that the "heightened scrutiny" is contrary to the statutorily limited review of necessity determinations as provided in the UCPA. *See* MCL 213.56. This Court, however, has transformed "heightened scrutiny" into the test of the constitutionality (i.e., public use) of the taking. *See Edward Rose, supra*; and *Tolksdorf, supra*. The utter confusion in this area of the law requires the adoption of a simple, straightforward constitutional test for Michigan condemnation cases. Adopting the test advanced herein would eliminate the confusion in the judicial review of "public use" and "necessity" and the distinction between the two would be restored. Dearborn requests that the appropriate constitutional test of condemnation again be applied by overruling *Poletown* and its progeny.

B. A Decision Overruling *Poletown* Can Be Applied Retroactively.

In *Pohutski, supra*, this Court set forth the factors to be considered in determining whether a decision overruling prior precedent should be applied retroactively or prospectively. This Court stated: "Although the general rule is that judicial decisions are given full retroactive effect, a more flexible approach is warranted where injustice might result from full retroactivity ... [There are] three factors to be weighed in determining when a decision should not have retroactive application. Those factors are: (1) the purpose to be served by the new rule; (2) the extent of reliance on the old rule; and (3) the effect of retroactivity on the administration of justice ... An additional threshold question [is] whether the decision clearly established a new principle of law." [citations omitted].

In this case, a decision overruling *Poletown* should not "clearly establish a new principle of law", but rather should restore the state's eminent domain law to the principles that existed prior to the erroneous pronouncements of *Poletown* and its progeny. Therefore, the general rule is applicable and this Court's decision overruling *Poletown* should be applied retroactively. *See Pohutski, supra.* If the Court restores Michigan condemnation law to the pre-*Poletown* test, then those cases that survived *Poletown*'s "heightened scrutiny" test are by definition valid. Those cases that did not should be remanded for reconsideration applying the Court's new standard.

CONCLUSION

This Court is well advised to settle Michigan condemnation law by adopting established United States Supreme Court eminent domain jurisprudence defining the Constitution's public use clause. *See People v Stanaway, supra.* The United States Supreme Court has held that the "public use" restriction on the power of eminent domain is coterminous with the state's police power, that the transfer of condemned property to a private entity does not undermine the public purpose for taking, that "public use" does not mean "used by the public"; and the controlling factor in

determining a public use is the object for which the property is being taken. *See, e.g., Midkiff, supra.* Michigan condemnation law prior to *Poletown* was consistent with United States Supreme Court precedent. The decisions of this Court prior to *Poletown* held that the transfer of property to a private entity does not invalidate the public purpose for the taking, and that the taking is constitutional if it is for the purpose (object) of accomplishing a public benefit, notwithstanding the degree of private benefit from the taking. *See, e.g., Salem, supra*; *Ryerson, supra*; and *Shizas, supra.* *Poletown*, and its progeny, have contorted the constitutional test of the power of eminent domain to such an extent that *Poletown* should now be overruled. In its place, this Court should adopt the following public purpose test:

> **If the object of the taking is for a public use, the taking is constitutional; if the object of the taking is for a private use, it is not constitutional.**

The evidence before this Court leads one to conclude that the object of the takings for the Pinnacle AeroPark Project is for a public purpose.

Defendants' assertion that MCL 213.23 does not authorize the taking of their property by Plaintiff is without merit. The plain language of MCL 213.23 delegates the power of eminent domain to public corporations and further grants such corporations the discretion to determine the public purposes for which the taking of private property is necessary. No other statutory authority is necessary to validate the Wayne County's exercise of its eminent domain power in this case.

WHEREFORE, *Amicus Curiae* City of Dearborn respectfully requests that this court overrule the de facto *Poletown* "public purpose" and "heightened scrutiny" tests. In its place, this Court should restore Michigan condemnation law to its constitutional roots that recognize that: *"If the object of the taking is for a public use, the taking is constitutional; if the object of the taking is for a private use, it is not constitutional*".

Additionally, this Court's decision overruling *Poletown* as requested herein may be applied retroactively.

Respectfully submitted,

MONGHAN, LoPRETE, McDONALD,
YAKIMA, GRENKE & McCARTHY

By: _____

THOMAS J. McCARTHY (P36755)
Attorney for *Amicus Curiae* City of Dearborn
40700 Woodward Avenue, Suite A
Bloomfield Hills, Michigan 48304
248-642-5770

Dated: March 17, 2004.

STATE OF MICHIGAN
IN THE SUPREME COURT

On Appeal From the Court of Appeals
O'Connell P.J., Fitzgerald and Murray, JJ

COUNTY OF WAYNE,

Plaintiff-Appellee,

v.

EDWARD HATHCOCK, *et al*,

Defendants-Appellants.

Supreme Court Nos. 124070-124078

Court of Appeals Nos. 239438, 239563, 240184, 240187, 240189, 240190, 240193, 240194, and 240195

Wayne County Circuit Court
Case Nos. 01-113583-CC, *et al.*

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MARK J. ZAUSMER (P31721)
MISCHA M. GIBBONS (P61783)
Attorneys for Plaintiff-Appellee
ZAUSMER, KAUFMAN, AUGUST & CALDWELL
31700 Middlebelt Road, Suite 150
Farmington Hills, Michigan 48334
248-851-4111

ALAN T. ACKERMAN (P10025)
DARIUS W. DYNKOWSKI (P52382)
Attorneys for Defendants-Appellants (except Specks)
ACKERMAN & ACKERMAN, P.C.
5700 Crooks Road, Suite 405
Troy, Michigan 48098
248-537-1155

MARTIN N. FEALK (P29248)
Attorney for Defendants-Appellants Speck
20619 Ecorse Road
Taylor, Michigan 48180-1963
313-381-9000

ALLAN S. FALK (P13278)
Appellate Counsel for Defendants-Appellants
(except Specks)
2010 Cimarron Drive
Okemos, Michigan 48864
517-381-8449

MARY MASSARON ROSS (P43885)
Appellate Counsel for Defendants-Appellants (except Specks)
PLUNKETT & COONEY, P.C.
535 Griswold, Suite 2400
Detroit, Michigan 48226
313-983-4801

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PROOF OF SERVICE

STATE OF MICHIGAN }

COUNTY OF OAKLAND } SS.

JEFFREY A. ALCORN, being first duly sworn, deposes and says that on the 17th day of March, 2004, two copies of the City of Dearborn's Brief as *Amicus Curiae*, and this Proof of Service, were served upon all counsel for Plaintiff-Appellee and Defendants-Appellants as reflected in the above caption, via first class mail, postage prepaid.

Further deponent sayeth not.

Jeffrey A. Alcorn

Subscribed and sworn to before me this
17th day of March, 2004.

JOHN E. GRENKE

Notary Public
State of Michigan, County of OAKLAND
My Commission Expires: 6/22/04